HIAP LEE BRICKMAKERS SDN. BHD.

v.

UNICLA INDUSTRIES SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
MAHADEV SHANKAR J
[DISTRESS SUIT NO. 49-152 OF 1986]
14 JANUARY 1987

CIVIL PROCEDURE: *Application to release goods seized in a distress suit - Goods subject to distress - Goods found on the premises which is subject matter of agreement where rental is in arrears - Non-disclosure of facts - Whether fatal to the application for distress.*

On 26 December 1984 the plaintiffs entered into a lease agreement with the defendant Company. The demised premises consisted of an area of approximately 10,792 sq. ft. which was approximately one-quarter of the floor area comprised in the title HS(M) 3754, Lot 4 (Block C), Jalan Perusahaan Satu, Batu Caves Industrial Estate, Kuala Lumpur. The rent was RM9,173.20 per month.

On 21 March 1985 the defendants entered into a debenture with a company called Harimas Trading & Credit Sdn. Bhd. for a loan of RM2 million. By virtue of the debenture all the defendant's assets were charged to the debenture holders as security for the loan.

The defendants then fell into arrears in their rents. On 7 July 1986 the debenture holders appointed the claimants as Receivers and Managers of the defendant company and the issue of the outstanding rentals was negotiated between the plaintiffs' representative and the Receivers. As a result of the discussions, the plaintiffs' property manager sent a letter to the Receivers and Managers regarding the renting of half of Block C, Lot 4 and the agreed rental price was RM13,000 per month with effect from July 1986. Acting on the new arrangement the Receivers paid RM39,000 being the rentals for the months of July, August and September 1986.

On 17 October 1986 the plaintiffs took out an originating summons to distrain movable property found on the demised premises. The next day the bailiff attached all the property found on "No. HS(M) 3754, Block C". Following this the Receivers and Managers applied to the Court to have the goods seized released.

Held:

[1] The plaintiffs' solicitors did not give notice to the Court when they filed their *ex parte* application that the defendants were already under Receivership. Nor did they disclose that all the goods seized had already been pledged to the debenture holders as security for the loan. These facts were fatal to the application for distress because the plaintiffs were an unsecured creditor in respect of the rental in arrears between October 1985 and June 1986.

[2] Distress is only permitted on goods found in the premises which is the actual subject matter of the lease agreement under which the rental is in arrears. The demised premises under the original lease agreement ceased to exist as from 1 July 1986 since they had been merged with another quarter of Block C which now became the subject matter of a new tenancy.

[3] The plaintiffs may seize goods in the demised premises under the lease agreement made on 26 December 1984 but to do that the plaintiffs would have had to file their distress suit, confined to the goods on the demised premises and they would have to do so at some point in time prior to the agreement arrived at with the Receivers and Managers and also on the assumption that those goods had not already been pledged to the debenture holders.

[4] The plaintiffs had exceeded their legal limits in distraining the properties. All goods seized are to be returned forthwith to the claimants unconditionally and that the costs of the application with all the costs for execution be borne by the plaintiffs.

[Application allowed. Liberty to apply.]

For the plaintiffs - Ambiavagar; M/s. Ambiavagar & Co.
For the claimants - Vincent Lawrence; M/s. Eddy Chung & Co.

JUDGMENT

Mahadev Shankar J:

This was an application by the claimants above-named for the release of all goods seized by the plaintiffs in a distress suit for rent said to be due from the defendants.

I granted the order and my reasons for doing so now follow.

On 26 December 1984 the plaintiffs entered into a lease agreement with the defendant company. The demised premises consisted of an area of approximately 10,792 sq. ft. which was approximately one-quarter of the floor area comprised in the title HS(M) 3754, Lot 4 (Block C), Jalan Perusahaan Satu, Batu Caves Industrial Estate, Kuala Lumpur (hereafter referred to as the demised premises).

Attached to the lease agreement are two plans. One shows the lay-out of six blocks of work-shops cum offices designated block A to block F. It would appear from this plan that each block was a self-contained work-shop with two self-contained offices attached. The second is presumably a detailed plan of block C which was the subject of the lease. This shows that the block was subdivided into four workshops of 9,934 sq. ft. each and the two attached offices were also sub-divided into four offices of 1,258 sq. ft. each. So the total area of each of the four work-shops plus the office space would be 11,192 sq. ft. One of these sub-divided blocks had a sub-station measuring 400 sq. ft. The deduction of this area from the work-shop and office space left a figure of 10,792 sq. ft. and from this it is apparent that the demised premises were those indicated at the top end of the detailed plan. The rent was RM9,173.20 per month.

On 21 March 1985 the defendants entered into a debenture with a company called Harimas Trading and Credit Sdn. Bhd. for a loan of RM2 million. By virtue of the debenture all the defendants assets were charged to the debenture holders as security for the loan. Clause 15.1(d) of the debenture empowered the debenture holder to appoint receivers and managers of the undertaking, property, and assets comprised in the security.

Starting from the month of October 1985 the defendants fell into arrears in their rents. This continued up to June 1986. On 7 July 1986 the debenture holders appointed Raja Arshad Uda and Chuah Teong Hooi as receivers and managers of the defendants.

Shortly afterwards, it is obvious that the plaintiffs' representative and the receivers entered into some negotiations to resolve the issue of the outstanding rentals from the defendants which by that time amounted to RM82,558.80 being nine months rent from October 1985 to June 1986.

These discussions were held between, a Mr. Tan Kim San from the plaintiffs' director and a Mr. Ho Soon Choi of Price Waterhouse which was the firm of Chartered Accountants to whom the receivers belonged.

By this time a second company Unicla Malaysia Sdn. Bhd. had also gone into Receivership with the same receivers and managers.

There is some dispute between the parties as to precisely what was discussed and agreed. That need not delay us here because there is no dispute that arising out of the discussions the plaintiffs' property manager sent out a letter on 25 August 1986. This letter was sent to the Receivers and Managers of both Unicla Malaysia Sdn. Bhd. and Unicla Industries Sdn. Bhd. It refers to the renting of half of Block C, Lot 4. The agreed rental for this half of Block C now occupied by the two companies was RM13,000 per month with effect from July 1986. I must emphasize that the original agreement between the defendants and the plaintiffs was for a quarter of Block C as aforesaid. The new agreement was for twice the original space and my reading of a letter dated 25 August 1986 is that a new tenancy came into effect in which the receivers and managers and/or the two companies Unicla Malaysia Sdn. Bhd. and Unicla Industries Sdn. Bhd. were joint tenants.

Acting on this new arrangement the receivers paid RM39,000 towards rentals for the months of July, August and September 1986.

On 17 October 1986 the plaintiffs took out an *ex parte* originating summons to distrain removable property found "on the premises known as land held under HS(M) 3754, Lot 4 (Block C)". On the same day, with remarkable despatch they obtained an order from the Deputy Registrar. But the writ of distress pre-dated the order by a day, being dated 16 October 1986. By 18 October 1986 the bailiff had attached all the property found on "No. HS(M) 3754, Block C".

So the receivers and managers came to Court before me to have the goods seized released.

I would observe to start with that the plaintiffs and their solicitors did not give notice to the Court when they filed their *ex parte* application that the defendants Unicla Industries Sdn. Bhd. were already under receivership. This fact was well known to them. Nor did they disclose that all the goods seized had already been pledged to the debenture holder as security for the loan. These facts were fatal to the application for distress because the plaintiffs were clearly an unsecured creditor in respect of the rental in arrears between October 1985 and June 1986.

Furthermore, I take the view that distress is only permitted on goods found in the premises which is the actual subject matter of the lease agreement under which the rental is in arrears. So if the goods to be seized were in the demised premises under the lease agreement made on 26 December 1984, it would have been in order for the plaintiffs to distrain but to do that the plaintiffs would have had to file their distress suit, confined to the goods on the demised premises and they would have had to do that at some point in time prior to the agreement arrived at with the receivers and managers and on the assumption the those goods had not already been pledged to the debenture holders.

These pre-conditions do not exist in the present case. The demised premises under the original lease agreement ceased to exist as from 1 July 1986 in the sense that they had merged with another quarter of block C which now became the subject matter of a new tenancy.

Thus I formed the view that the plaintiffs had clearly exceeded their legal limits in acting as they have done.

On 18 November 1986 after hearing arguments I made an order in terms of prayers 1 and 2 of the claimants' application which is to the effect that all the goods seized be returned forthwith to the claimants unconditionally and that the costs of the application together with all the costs for execution be borne by the plaintiffs.

I refused an application for further argument and it appears that the plaintiffs now wish to appeal.

In their summons-in-chambers the claimants also asked for other orders and/or remedies deemed fit and just by the Court to grant to the claimants in all the circumstances of this case. Although I did not make any order under this prayer, it seems to me that the claimants are entitled to pursue a claim against the plaintiffs for any damages they may have sustained as a result of this unlawful attachment.

In addition, therefore, to the orders which I have made, I also give the defendants and the claimants liberty to apply.

Also found at [1988] 1 CLJ 512